

Pepperdine Dispute Resolution Law Journal

Volume 19 | Issue 2

Article 5

5-15-2019

Arbitration and Mediation In Cross Border Disputes: Possibilities and Limitations

Young Hye Chun

Follow this and additional works at: <https://digitalcommons.pepperdine.edu/drlj>



Part of the [Dispute Resolution and Arbitration Commons](#), and the [International Law Commons](#)

Recommended Citation

Young Hye Chun, *Arbitration and Mediation In Cross Border Disputes: Possibilities and Limitations*, 19 Pepp. Disp. Resol. L.J. 231 (2019)
Available at: <https://digitalcommons.pepperdine.edu/drlj/vol19/iss2/5>

This Symposium is brought to you for free and open access by the School of Law at Pepperdine Digital Commons. It has been accepted for inclusion in Pepperdine Dispute Resolution Law Journal by an authorized editor of Pepperdine Digital Commons. For more information, please contact josias.bartram@pepperdine.edu, anna.speth@pepperdine.edu.

ARBITRATION AND MEDIATION IN CROSS BORDER DISPUTES: POSSIBILITIES AND LIMITATIONS¹

Moderator: Jack J. Coe

Speakers: Cedric C. Chao, Ruth V. Glick &
Nathan D. O'Malley

Jack J. Coe: Let me do what I like to do in many of my classes when talking about this sort of landscape: identify some of the players and begin by talking about whether there are, in fact, conflicting interests (or coinciding interests), and for those of you who are in the LLM program here, you need no introduction to these.

We start with the disputants themselves, right? If you like, the client, then the lawyers, and here I would identify two categories that may have different thoughts on flexibility and ADR: outside counsel represented in this panel and in-house corporate counsel. I think there may be some room for talking about whether those two interests are the same.

Then there are the courts, of course, that play a role. For purposes of today's panel, there are two kinds, at least, of third-party neutrals: arbitrators and mediators. Increasingly, there is this new kind of—we look at it sort of as an emerging job opportunity for our students—tribunal secretaries.

And more topically of interest, third-party funders who have been more and more involved in the field and the question has become sort of: “is it a good thing, bad thing and what impact do they have on the choices we make in looking at our ‘ADR toolbox’?” So that's sort of the “one piece of this puzzle” and we are all going to try to put together this crossword puzzle together, or maybe it's more of a thing where you make a picture in due course.

Let me give you some quotes I've heard recently about, in particular, settlement, because there is a theme that runs through both our panel and the next one.

First, I have a friend who says: “ADR (and he happens to be a partner in a law firm) stands for an ‘Alarming Drop in Revenue.’” He says it with a smile, but there is a view out there that ADR is not necessarily consistent with

¹ This is a transcript of the first of two panels from the “Synergy: Flexibility as Key to ADR Practice” Symposium, hosted by Pepperdine's Dispute Resolution Law Journal, which was held February 10, 2017 at Pepperdine Law School in Malibu, CA. Jack J. Coe, Jr., Professor of Law, Pepperdine School of Law moderated this panel, with participation from Cedric C. Chao, a partner at DLA Piper, Ruth V. Glick, Founder of Glick Dispute Resolution, and Nathan D. O'Malley, a partner at Musick Peeler LLP.

the big law firm model. I'm not saying that it's true; I'm being provocative. Two, I have a fellow arbitrator who, whenever we see each other at a conference, comes up and introduces me to a third party and says, "Jack and I were arbitrators together. The problem is the parties had the audacity to settle." Then I have worked with other arbitrators and, in private, one has said to the other, "Why don't these parties just settle?" And a very famous and distinguished counsel once said, "Listen, when it comes to this whole field, there is no daylight between me and my client." Right? And this was in response to this conversation about a mediator who once said, "You know, if I could just get past the counsel to the actual disputant, we might be able to reach a settlement."

And so let me ask, starting with Ruth, to identify which of those roles she considers herself as playing primarily. She told me earlier that she's a mediator/arbitrator, but to describe that role a little bit and we'll pick up after that with Cedric and Nathan. And feel free, by the way, to address any of those cynical bumper stickers that I floated out there in my effort to be provocative.

Ruth V. Glick: Thank you. First, I'd like to say, I'm honored to be here today. Especially—some of us had lunch with the students and not only are they intelligent, but they also represent all parts of the world. And there is truly a diversity here, which gives us a whole international point of view.

We were talking a bit about the stakeholders in the arbitration process and I am an arbitrator primarily but I also do mediation. I also came from a business world. I do not have a traditional track to where I am today, but I do a lot of domestic and international arbitration and mediation. But as an arbitrator, an international arbitrator, I believe that it is my duty to provide an independent and impartial resolution to the dispute. I believe that I should give some sort of reasoned award within the confines of what's done traditionally in international arbitration. I believe I should conduct and provide a full and fair hearing, where all material and relevant evidence is presented. And I believe I should do that in an effective manner as, what we now call, a managerial arbitrator. I am in control and I try to do this in an expeditious, cost-efficient manner. And my job is to resolve the dispute. They are in front of me because of an arbitration clause, an agreement, so it is my contractual duty to resolve the dispute. So, would you like me to comment on anything further?

Jack J. Coe: No, I've written down "managerial arbitrator" and we're going to explore that in a little bit, but let's hear Cedric and we'll come back to this idea of "managerial arbitrator." I love it.

Cedric C. Chao: Thanks for having us here and it is a great pleasure and honor to see people around the world who are interested in this. Jack and Tom² are truly authorities in this area so you are very lucky to have them as your professors.

² Referring to Thomas J. Stipanowich, the Associate Dean of Straus Institute for Dispute Resolution.

So, a bit of background so you know where I'm coming from. I was an Assistant U.S. Attorney one year out of law school. I clerked as an Assistant U.S. Attorney to learn how to try cases—get into court. It's very hard to do that as a young lawyer in any type of practice because clients don't want a young person trying their case: you would be supporting. So I did that and went to a former firm, Morrison Foerster and made partner and was practicing there for quite a while. I did both business litigation and white collar.

As the world globalized, as the economy globalized, the firm started having more cross-border work and they asked me to start the international litigation practice at "MOFO," what we called ourselves. And then, that segued into arbitration, which became more and more active and we had to learn how to do it at my former firm. I had my first "surgery," my first arbitration, and we learned and had consultants from outside, but we broke into that little "clubby world" and there are just certain things, you know, certain things you do in that little "clubby world" to break in and we broke in. We became quite good at it. Now, I've been with my current firm for over three and a half years doing the same thing: U.S. court room and cross-border.

So, I consider myself 90% lawyer/advocate. What is different about the way I approach this is: because I came from the U.S. courtroom side and then went into international arbitration, I can tell the clients: "I go either way. I'm not pushing you to do ADR because that's all I know how to do." And there are some very fine arbitration specialists and advocates, but they were trained as a younger lawyer in that area and didn't get their teeth cut in U.S. courtrooms. But I could also go in front of juries because I still do that. So I can go both ways and I tell the clients, "I'm going to push you and I'm going to give you the pluses and minuses of both."

And what strikes me on the speaking circuit is, when you go to these international arbitration conferences, international arbitration is like a God's gift to the world. There's nothing else that's any good, nothing else that works. Especially Europeans will say that. And yet, I'm in an arbitration right now, which illustrates some of the dangers of arbitration, and maybe I'll get to that a little bit later.

But there are bad things about arbitration, so I've written a series of articles for corporate counsels and one of the titles, and I'm provocative like Jack: *Be Careful What You Ask for: International Arbitration, or Eight Nasty Surprises Awaiting the Uninitiated in International Arbitration*.

I've moderated a panel for the IBA on litigation summit, annual litigation summit. My panel was: "Effective Advocacy of Intellectual Property Disputes." Most of the people or maybe two-thirds of the people were from Europe. If you ask a European, "Would you rather have your dispute, if you're the corporate counsel or outside counsel, resolved in an arbitration or in front of a U.S. jury," they would say: "my goodness, there is no choice, of course in front of arbitrators." So I asked a U.S. district court judge, Susan Nelson (very well-respected in the Northern District of California) and she said, "the jury." I asked the head of litigation for SanDisk (he's been in both arbitrations and jury trials). He said: "jury trial." Lastly, I asked a trial lawyer

(not an arbitrator) and he said, “of course.” And so you look at the Europeans and the audience, and they were shocked.

My point was that each system has its pluses and minuses. And I tell clients: “you’ve got to learn both, and if you want arbitration (and there are some instances, especially cross-border matters, where there are really no good alternatives), then you’ve got to understand what the downsides are and draft your contract in a way that you prepare for and mitigate some of those downsides.”

And, I could keep going on and on, but there is one thing that sort of will peak people’s interest. I moderated a panel ten years ago in China. I asked—this is ten years ago and these were all Chinese, foreign lawyers from leading firms: “Can a foreign company receive justice in China and the Chinese system?” And one of them, the head of arbitration for the biggest firm in China, said: “Well, I’m not aware of a Chinese court enforcing an arbitration award against a Chinese company.” And then I asked, “Then what do you tell your clients after going through the whole process and it’s worthless?” She answered, “Well, I tell my clients: ‘lesson learned, move on.’”

Now fast forward, four or five years ago, I had a similar panel in China and it is very different. Right now, some of the players would say, “I think things have evolved, it may not be fifty-fifty, but we are comfortable going into the Chinese courts.” The general counsel of an American company in China said, “my mandatory dispute resolution provision calls for Chinese courts.”

So every client has different circumstances and every country is a little bit different. But you are all entering into a world that’s very exciting, very interesting. And there is a lot to learn, many different languages, legal languages for you to learn.

Jack J. Coe: Before we turn to Nathan, there is one thing that stuck out. There is another meaning for the acronym, “ADR,” which is: “Appropriate Dispute Resolution.” And the people who like the change from “alternative” to “appropriate” are of the mind that we include litigation as one of the tools in the “toolbox” because again, arbitration is not free of potential perils.

So, I like very much being reminded about that other possibility. I want to come back, just to warn you Cedric, to talk about the transition from litigation to arbitration practice because there are some who say that that’s part of the problem. These litigators bring to arbitration the “litigation style,” particularly American style, and make it very difficult for us to be “managerial arbitrators” because they use the “D word” for example, which my students know is “Discovery”—as opposed to document disclosure (and other four-letter or less words).

Nathan.

Nathan O’Malley: So, if you are to find me standing in front of a jury, that would only mean that something terribly wrong has happened. Because I, unlike Cedric, have not come from the broader base approach to international arbitration, which includes a span of time learning how to try a case in front of a jury in the U.S. court system. He’s obviously pointed out to

you some of the very good reasons why having that experience is profitable and good for his clients.

Most of the time, when I am approached to do a case, especially now that I'm here in the United States, when I'm asked to be counsel in international arbitration, which is where I spend virtually 100% of my time, it's from a client that is American but is very convinced of international arbitration, or it's a European company or potentially sometimes an Asian company, who will do everything they can to stay out of an American courtroom.

And there is no point discussing that point, there is no debate on that issue. By the time it gets to me, the choice was already made in an arbitral clause, or if it hasn't been made or was alluded to or if it was a question, the client has already made clear that they want to go that direction.

But there are certainly instances where one may want to look at different approaches to dispute resolution and say, "Will we do better in the courts here than we will in an arbitral tribunal?" In discovery, and intellectual property disputes in particular, I can see where there is a definite argument to be made along the lines of the availability of discovery: why you would want to potentially be in an American courtroom in some instances.

However, for my practice, I would say that I am part of a growing trend, as Cedric pointed out, of advocates in this field who "cut their teeth" in this field.

I commend all of you LLM students for picking a great program and following up on specialist education in this area. I did the same as you did. But I did it on another continent. I started my practice as a young lawyer in Europe and I was working in Amsterdam with my first job as an associate. And I spent my time there, for Northern European Standards, a fairly large Northern European firm and our practice was entirely filled with international arbitration type cases. Although, occasionally there were cases where American courts would sometimes get involved.

One of the things that really surprises me about coming back to the United States is how often American courts are involved as compared to their European counterparts. In terms of just trying to get the case to arbitration, it's a much more complicated process here in the United States than it is, most of the time, in Europe by my experience. I was there for about eleven to twelve years where I was an associate and a partner in various Benelux law firms. I practiced for that time entirely in international arbitration.

So, I am counsel most of the time and I would probably put this split of my time at 90%-10% as well because I occasionally do pick up appointments as an arbitrator. And I have been lucky to be doing that for about ten years and I appreciate that we are here today to discuss the differences and failings, and also successes of the system because there is a lot to discuss.

I am of the opinion, and since we are all being provocative today, I am of the opinion that there are just very rare circumstances in which a cross-border commercial dispute does better in front of an American jury than in an international arbitration forum. That's probably because I'm being provocative that I said that.

If you were to ask me in private or in a counseling session, I would be more nuanced, but I decided, since everyone has been ramping it up and I'm here at the end of the table, I'll throw some gasoline on the fire and see from my end if we can spur some discussion.

**** Laughter ****

Jack J. Coe: Fantastic. Well, that's a nice sort of start and it helps me understand where we are. Can I invite Ruth to say a little bit more about what she means—was the term “managerial arbitrator?” And please elaborate.

Ruth V. Glick: Yes. Okay. But let me just remind you that I came through the business world and the kinds of disputes that I arbitrate are basically breach of contract or some kind of commercial disputes.

My colleagues over here, who are the litigator advocates, I think sometimes judge the process on whether they win or not. We always have the “winning side is always the happy side” and the losing side doesn't like that system. When you have a business client, they want to win so, you know, the pressure is on and they have to keep their clients happy.

But I look at the disputes this way: they come to me, and I'm thinking they want a resolution and they want their problems solved and yet they don't want to spend an arm and a leg, which happens so frequently now in arbitration as the American litigization has spread beyond our borders. And, you know, folks are very upset about that. So, I think that's one of the bigger problems of arbitration.

That being said, I'm a member of the College of Commercial Arbitrators, and about five, six, seven years ago, we had a forum of all the stakeholders of arbitration, including but not limited to arbitrators, advocates, in-house counsels and the ADR providers, to try and solve some of these problems.

So, we came up with this concept of the “managerial arbitrator,” and the managerial arbitrator is one who takes charge right away to try to increase the efficiency of the whole process. So, for example, my first connection with a case—I mean I may get some papers but I won't know very much about the case—my first real contact with the advocates is going to be in that pre-hearing conference call or pre-hearing conference meeting. It is nice if you can get together in person. And at that point, that's when we do our scheduling and I usually have a whole list of things that we go through so we maintain all the dates. It is when we, you know, sort of set down how the process is going to work.

Now, I love to be flexible if the advocates agree. I'm not going [to] impose my will unless, you know, something crazy. But usually, they agree. I encourage them and that's where this idea—I love this idea of “flexibility,” which you have in the title of this program, because we can be flexible but yet we are still in control. When I say “we,” I mean the arbitrators. So we maintain the control and the idea is to get the case moving along so: we don't have all kinds of continuances, which cost more and more money and we keep everyone on sort of a tight time frame, but we encourage (and we'll get to this a little bit later) I encourage the cooperation of the advocates, which can, down the line, lead to settlement. And we are going to discuss that in a minute.

Jack J. Coe: Absolutely. Thank you for that. I am always fascinated by wearing multiple hats, sometimes at the same time. These stakeholders, we're talking about.

But, let me ask both of our litigators:

How does one role impact the way you function in the other role? You are principally litigators, and not arbitrators, yet you sit as an arbitrator. So, when you go from one to the other, what kind of switch, and what kind of new template is applied to the process in your mind?

Cedric C. Chao: Maybe I'll start. I do sit. I have sat from time to time for ICC; I have been presiding arbitrator and wing arbitrator, and then Singapore SIAC as sole arbitrator. I think, the sitting as an arbitrator—in contrasting that experience as an advocate in front of a very high profile very high stakes arbitration—it made me appreciate that the arbitration is a creature of voluntary consent to opting-out of the default procedure, which is the courts.

And one of the either upsides or downsides (depending if you win or lose) of arbitration, is this: no right of appeal. So the arbitrator can make an error of law—and unless it's really, really egregious, in which case you might say there has been a something fundamental miscarriage of justice or a public policy problem and get the arbitration award vacated that way— but if it's just sort of, I'll just call it ordinary error law, there is nothing you can do about it. But in a court, I have an automatic right of appeal.

Right. So, Ruth's alluded to this. I've got clients coming to us from another law firm that lost. They hate arbitration. They get others who win. They love arbitration.

So, is it good or bad that there's no appeal? The advocates of arbitration say, "Hey you want something quick, so why drag it out for an appeal?" Well, that's great unless you lose. If you lose, you say, "What a kangaroo court process is this?" Which makes it all the more important that the process be very fair.

So, I'm going to contrast two situations: First, as an advocate and it's in front of one of the most prominent ICC panels, just the giants of arbitration. And I'm up against a very prominent US law firm. We each have actually the two best Korean law firms on either side. Korean law, hundreds of millions of dollars at stake. Discovery battles. Discovery battles. But one of their prominent arbitrators of the other side picked their nominee. I was sort of surprised that I had my CEO on the stand and he goes through cross-examination. I'd breathe a sigh of relief, you know he's off and then the arbitrator, the party-nominated arbitrator, started asking questions and you can't object to that. And he's acting like a second, even better, cross-examiner than the other side and I'm thinking, "he's supposed to be neutral, he's supposed to be independent. What is this?" And I catch the eye of the presiding arbitrator who is very, very prominent and he looked at me and you know, I sort of thought, I wonder if I should feel good that he knows that this other wing arbitrator is acting almost like an advocate. Now, at the end of the day, I won, but I do believe inside closed doors that the party-nominated arbitrator on the other side was pushing, pushing, pushing to try to get a

smaller award than what I was asking for. You know both sides were going against each other.

Fast forward to when I was presiding arbitrator for ICC in Vancouver. UK law. And it was a dispute between Israeli and PRC companies. Quite a bit at stake, and there is different culture, different business understanding and one of the party-appointed arbitrators was very partisan, if I can use the word. He would only ask questions to the other side, never asked questions of lawyers who had nominated him. And I felt I could see the lawyer for the other side look at me and say, “Hey you know, is this a fair process?” I became very protective of the process. I wanted at every instance to have unanimous even on evidentiary issues. I would go, you know, behind closed doors and we would talk it out and there will always be a compromise and maybe no one was ever perfectly happy but I wanted the parties to say, “win or lose, I’ve been heard” or “win or lose, it is a fair process.” And that was not only evidentiary issues, and most various motions, but also the award itself. And then the other wing arbitrator was also a little bit more sort of pushing but a different style, not quite as, you know, hit you in the face, but sort of little subtlety, in some ways, very effective advocating the position of the party that nominated him. At the end of the day both, you know, they said, “I can do this, but I can’t do this,” and I wrote the opinion. At the end of that they both said, “we’ll go with whatever you do,” and they felt like they’ve been heard out. But that, to me, opened my eyes. That there is a sense of arbitration and you think there’s only one right answer. That’s not true, there is a range of answers in any process. You convince another juror to go your way then that juror becomes a little more of an advocate in jury deliberations. And you can push the arbitrators one-way or the other.

So, my big lesson on all this, on these two experiences, is fairness.

At the end of the day, it’s not just “process” and “get me results” and I’ve settled more cases as a mediator. It’s, did the parties come and go and say: “Okay. I could live with this and it is fundamentally fair”? Or was it just grossly unfair? I’m in the process right now of this other case where the other side—I represent a very large state-owned enterprise from China and Texas plaintiffs’ lawyers. And there’s no secret that it’s been in the press. There’s been all kinds of ancillary litigation in Delaware and Texas and federal court. The other side nominated seven out of nine arbitrators. Now, it’s unheard of, unheard of in U.S. jurisprudence, unheard of international arbitration and we say that and yet the arbitral institution felt that like they couldn’t do anything about it.

I think it was misinterpretation of the contract, and my position is: this is an arbitration gone wrong. I’ve got to now move to set aside and they’re going to come in and say, “Hey, you all chose this process” and our answer is “My clients actually didn’t.”

They are the parent company in China. The US subsidiary was a signatory. So how can you bring in, under alter ego theory, you know in this process and how the arbitrators, seven of whom you appointed, determine you know whether we are even part of the process. I mean it is a total miscarriage

of justice and it's going to go up to the Fifth Circuit. I mean, we will make new law one way or another.

But that's part of the, you know: "Is it a fundamentally fair process?" And that's part of the excitement of this, which in every circumstance, is a little bit different.

Nathan O'Malley: So what do you do with nine arbitrators in a room? My goodness, that is a lot of money being spent there. **** Laughter ****

Cedric C. Chao: Well, they wanted—no, it's like it was sort of a joke you know. The whole process was a joke. At the end of the day, their damages sought were like seven and half a billion dollars. We chose, and again this is all public, we chose, since we're not signatories, we said, "We're not showing up. We're not showing up." We're going to maintain our jurisdictional issues. But then the arbitration award came down, again it was public, it was like 65 million which is less than one percent of the claimed award. But now the question is, do you move to set aside? And we don't like it because, you know, a lot of these arbitrators are not even arbitrators, they are Texas plaintiff's lawyers who are friends of the plaintiffs. I mean, what a joke. But they are going around and saying these findings, which if they are not xenophobic then I don't know what xenophobic is, but it is like, you know, state-owned enterprises and People's Republic of China and there is no corporate separateness: highly inflammatory and inaccurate stuff. And that's part of the process and how did this process get designed, you know? It was a contract that had dispute resolution and it was interpreted in a crazy way.

Jack J. Coe: Just to underscore the point made earlier about the "lack of appeal." We have this possibility of "set aside," but I started to say: "Well, isn't it possible you could get caught in some—I wanted to use a less than sophisticated venue somewhere in the United States—I won't name a name, but who also had a lot of xenophobia?" And your answer would be, "see ya," but the difference is I could then go on appeal.

Cedric C. Chao: From a U.S. court system, I have a right of appeal and abuse of factual finding is a basis to overturn it.

In the arbitration setting, one of the grounds is when the constitution of the arbitral panel is contrary to the rule of law, contrary to due process, contrary to the contract. And that is, therefore, jurisdictional and that is the basis to set aside the award.

But you have to count it all in. Sort of, are the arbitrators overstepping authority or are we having other public policy or fundamental miscarriage of justice? But that's different than saying error of law.

Ruth V. Glick: But it's hard.

Cedric C. Chao: It is hard.

Nathan O'Malley: I would just contribute to that by saying that this is exactly the reason why the courses you are being offered here are so valuable. Because somebody made a mistake along this process in either drafting the clause or in understanding the clause, and that is why, from my perspective, "the international arbitration bar" (if I can use that phrase) is so useful because you can go around the world.

There is a definite growth in this area. Generationally speaking, people that were in Europe and expats at the same time that I was there are now spread all over the globe doing various great things. While I'm just humbly here in Los Angeles but they are all the high and mighty.

But the great thing about it is, they are all spread around the globe and this process is constantly happening out of great international arbitration centers so that, when we are all meeting together again for either a case or some discussion such as this, we are increasingly, no matter what your jurisdictional background is, speaking the same language.

And that is really important. Because that will only contribute to the improvement of the system as both an arbitrator and a counsel that we can come to the table, whether your office is in Buenos Aires or Los Angeles.

And when we talk about disclosure, when we talk about choosing an arbitrator, or when we talk about the conduct of the proceeding, we are choosing the same language. And that is essential. And it's growing and it's developing and I can say that the contribution to literature in this area has been immensely helpful by a number of different sources, and I feel personally that this is a demonstration of why the system is working and is getting better.

Over the last ten years, I have definitely witnessed a growing synchronization in this area. So, I think if I was to add to the actors on your list, this is a perfect example—this case that was just given to us—of why the academic or instructive actor is so essential to the system working out and being improved.

Jack J. Coe: That is very nice of you to mention the academic world. So, I'm going to add professors first to that list.

Nathan O'Malley: Yeah, exactly.

Jack J. Coe: I am not going to let you get away from answering the original question. Nathan and I were arbitrators together but not really recently. In arbitrations that were parallel. Without going into detail, we each knew we were arbitrating similar cases and similar parties and so on. But that's another story.

The question: Your role as a counsel and its impact on your role as arbitrator and vice versa.

Nathan O'Malley: So, I personally believe very strongly in having arbitrators who either have an immense wealth of experience as an arbitrator—have either come to it from an immense understanding of the system, which means primarily academic background or something—or the primary way of becoming the way of an arbitrator: having gained a lot of experience as counsel in international arbitrations.

I think that the work that you do as counsel informs, greatly, the role that you have as an arbitrator in terms of knowing how things go along. I can tell you in referencing that case or other cases where I've been an arbitrator: when you have a background as counsel, you know, you know what you are talking about. Because you have seen the greats do it and you've been in front of them and you know how they do it. So, when counsels are in front of you trying to persuade you that ten depositions are perfectly normal for international arbitrations for either side, you know that is complete nonsense.

Now, if that's what the parties agreed to do, that's fine. But usually that's not what happens. Usually it's one side or the other that's trying to do something like that. I think that confidence that comes out of having a lot of experience as counsel in international arbitration greatly assists your ability to be an effective arbitrator. I do believe international arbitration is completely—not saying completely, that would be putting it too strongly—is a very different process from domestic arbitration. And so we can leave that topic for another part of the discussion.

But I think that the experience in international arbitration is essential to be able to be an effective and competent arbitrator.

Going the opposite direction, I will briefly say, it is always nice to be behind the curtain as an arbitrator when you are working as counsel. It does help you sharpen your skills in terms of realizing the presentation value of what you are doing and the ability and deliberative process that will be taking place based upon what you've done. So that's always useful, I find, from my perspective.

It goes both ways, but I would say being counsel sets you up with confidence to be a good arbitrator.

Jack J. Coe: Just a quick follow-up. Two questions: Is there ever any tension when you want to sit as an arbitrator with what your firm priorities would be in terms of business development—they would rather have you be counsel and spend your time doing that, I suppose. And two, does it improve the confidence of the client that you've been on both sides? And do you play that card?

Nathan O'Malley: Briefly. I do know that there are tensions on that first point that exist out there. I choose my professional affiliations with that in mind. So that's a stipulation to any new firm situation that I'm going into that that's not going to be an issue. Sometimes there's a difference between "choosing A or B," and what I do. And the second point, in terms of . . . what was your second question?

Jack J. Coe: I was already thinking ahead . . . Helping the client?

Nathan O'Malley: Yes it does, actually. When you say, "I've been, a fair number of times, an ICC arbitrator," it just recommends to the client that you know what ICC arbitration is about. They are usually very happy to hear that you've been part of that process.

Jack J. Coe: In a moment, I'm going to ask Ruth to talk about multiple stakeholders and wearing different hats to distinguish between arbitrating and mediating.

But in fact, why don't we go there now given that, I look at the clock, it will help us progress to the next thing? We can stay on the first cluster of questions for another thirty minutes. But I'm duty bound to move a little bit ahead. But think of your questions soon because I am going to ask you to weigh in. I know many of you are not shy, so I'm looking forward to that.

Ruth V. Glick: So, I think what you might want me to talk about is, "what is the proper balance of mediation and arbitration?" During an arbitration . . . do they know the difference?

Jack J. Coe: Our students tend to know the difference. But just talk about when I put on my mediator hat, I know this is what I'm going to be in for.

Ruth V. Glick: This is easy. When I'm the arbitrator, I'm like Trump. I'm in control. When I'm a mediator, I'm a facilitator and I don't have any ability to make the decision. I can urge, I can cajole, I can give them their strengths and weaknesses but I don't have that ability to make a binding decision.

I do want to talk about how I do both arbitration and mediation, which is perhaps a little unusual. I was talking with Cedric about how sometimes people are good at arbitration and some are good at mediation. I enjoy both for different reasons, but I will say how my experiences as a mediator has colored my ability to arbitrate. Because when I get a case, for a breach of contract or a business dispute, and I don't know anything about it in the beginning, and many times I'm in the middle of the hearing and I'm saying to myself, "why didn't they settle this dispute? Why is this here?" So there's probably more that I'm not going to know about. I might know it as a mediator because I'm meeting with them *ex parte* with each side telling me different things, but as an arbitrator, I'm never meeting with them *ex parte*.

So that led me to think about some cases that I had where I just sort of left the script and was a little more proactive in encouraging settlement and I wrote an article about it called: "*Guided Decision-Making Promoting Settlement During Arbitration.*" And I'm really sort of in the middle of the continuum of not mentioning arbitration to over promoting it. Because you cannot over promote it because then you are not impartial because you think there should be some compromise.

When maybe a case . . . maybe there is no compromise. Maybe it's a slam-dunk like Cedric's cases always are when he's representing a party. So, you have to be very careful. I tend to mention it in my first preliminary hearing: "Have you considered mediation?" Sometimes, they may not even tell me that. But I bring it out.

The ICDR Rules even mention mediation. I get most of my cases from ICDR. And throughout the course of it, even with our preliminary hearing, I write in my order language that encourages attorneys to cooperate in their discovery or other matters. Many times if we have some preliminary or dispositive motions, and there's briefing, I might call all the parties together and encourage the attorneys to bring their clients so they can see what's going on. I might use different mediation techniques if appropriate.

As I say, not all cases are the same. I'm talking about business disputes. Sometimes, even there's possibility for a continuing relationship, it might be in their interests to settle it. But that's not for me to know. I don't know that. I can only pick up whether there is an interest. Whether they are talking to each other. And during the hearing, I might let the lawyers and principals talk to each other and I might leave the room. I never meet with them *ex parte* because I never want them to doubt my role as an arbitrator: "The woman in control." I might also use that to scare them a little so that if they can't resolve it, I can do that for them.

Jack J. Coe: That's both a good title for an article and the way things are at my house. "The woman in control." ** **Laughter** **

Ruth V. Glick: Well you'd be surprised how nervous that makes some people.

Jack J. Coe: Well, no I wouldn't actually. ** **Laughter** **

Ruth V. Glick: So I may do some other things. What I like to do is narrow the issues or sometimes some things are not that important. I like to understand what the most important issues are and sometimes that exercise helps them focus on what's important. You know, as an arbitrator, we are not making precedential law, so it doesn't matter.

Business people want to settle their dispute or they want to get what they came in for. It might be different in a patent dispute, for example, because there has to be a winner and a loser. But it just depends on the kind of case. I might restate everybody's positions, which is what mediators often do. That gives every side great confidence that "She gets it; she gets my side." I might tell them what I don't understand or what I would like to have them brief or if they are going to be closing briefs, what I would like them to address in the brief.

I don't like to tell them what I think of the case, but I might point out what I would like to hear more about, which is going to give them a clue of what's important to me. I use different tricks, at different times. But I try to create opportunities as they present themselves in the appropriate case where I can sense, you know, you can tell when parties are talking to each other: are they friendly or very hostile or not. Sometimes when they are friendly, and I know there is a good lawyer working for the best interest of their client, and they will, I'm sure, constantly remind their clients "maybe we should talk to them about settling," I give them that opportunity if they need the extra time. That's fine.

Jack J. Coe: This gets us nicely into the next cluster. Are there any questions immediately before I get us into the roman II? We are working from the outline here. Anyone have a question? We will also have time at the end of questions.

Okay, so these are all interconnected. It has to do with the question of the extent to which arbitrators—and you could put, I guess judges in there—but arbitrators should be prone to promote settlements, if at all.

Let me put it to you this way: there is a continuum. There's one model I call "the old elegant British Jurist model," where their attitude is, in the common law where the judge sits back and leaves it to counsel to put the case and then decide the case. That carries over into arbitration and that same judge acting as arbitrator might add, "Oh, by the way, it's not for me to get involved in promoting settlement. That is something for the institution if the institution wants to remind them about ADR possibilities, good for them. But I'm not going to change what I do in any respect based on trying to promote settlement, let alone begin to have a conversation about 'Did you think about settlement.'"

The other end of the continuum (I put Ruth in the middle here, but more proactive from center), could be an arbitrator who believes that it's all just a

continuum of techniques and so: “I’m arbitrating, but I’m thinking in every possible respect, how can we settle this?” Right? So, blending the arbitral and mediation roles.

I actually saw this happen once, unwittingly, where I think the person who was appointed didn’t realize today they were supposed to be the arbitrator not the mediator. And to say things got out of hand is an understatement. In fact, it made it very easy to vacate the award. Long story.

So, I’m putting it to my two colleagues. Where in that continuum do you think it’s proper for the arbitrator to be or is there a zone in there? Let’s start with Nathan.

Nathan O’Malley: In the interest of being provocative, I hope if any of you are ever an arbitrator in one of my cases, that you will not for even a moment spare the thought that you are a mediator, because I see them as completely different roles.

I think that when you come to international arbitration, generally speaking you are dealing with pretty sophisticated parties. They know they appointed an arbitrator and they want the arbitrator to act. Is it helpful for the arbitrator to sometimes do some things useful for settlement? Sure. I can see that there is a spectrum within the tightly confined role as an arbitrator that there is a room for that.

As an example, I was in a case that was seated in Brussels about seven years ago. I came out to the hearing room after some deliberations and the arbitrators said, “We just want to inform the parties right now that right now, we do not have any view on the merits of this case in terms of who is going to prevail.” And this was after several days of hearing. That was perfectly acceptable as an arbitrator to say and it caused the settlement to happen. Because the parties said, “If they are at this stage and still not able to come to a clear view, this is a tight case and we are going to settle it.”

Jack J. Coe: And just to put this in context, this was at the hearing and there had already been presumably written submissions by both sides, perhaps two rounds?

Nathan O’Malley: Two rounds, written submissions, three days already of cross-examinations.

(Coe interjects: witness statements)

Nathan O’Malley: Two days together. That’s certainly the case.

Another example was when I was in a hearing with some very big names in international arbitration in Abu Dhabi. We had a preliminary hearing on a very important issue. The arbitrators came out and said, “we see your issue, Mr. O’Malley. We are not going to give you your issue today but we are going to think about it as it pertains to the future.” The parties settled because they knew there was a risk out there now that the issue I raised was going to come back and possibly decide the entire case one direction or another.

So those are the things I think are within the confinements of an arbitrator and perfectly acceptable for arbitrators to do.

Where I find problems is where an arbitrator, in any way, starts to actively engage in attempts of settling the case. And there, I draw the line very brightly. I would let anybody who thought they could do that know I do not

want you to do that. We are here for an adversarial process and that's where it has to stay until someone decides otherwise.

Ruth V. Glick: So what you are saying is, you'd like a little bit of information.

Nathan O'Malley: Sometimes that can be helpful. I'm just saying that sometimes there's room within the role of being an arbitrator that can assist the parties in some means of arbitration, but it's got to be confined within that very bright line.

Ruth V. Glick: I agree with you. I don't conduct settlement negotiations. I leave the room and let them talk about it. But you know, CEDR, which is in Great Britain, has rules where parties can stipulate that they want to hear what the arbitrator thinks.

Nathan O'Malley: Let me just say, I know there are a lot of different shades of views on this. I'm definitely not representative of the international arbitration community on my thoughts on this. I just have a very bright line view on this because I've seen it the other way. Also, culturally speaking, there are tendencies in different cultures that don't divide neatly along civil and common law divides, in terms of how this is approached, but I don't want to cut off Cedric. Cedric, react to that.

Cedric C. Chao: To me, arbitration and mediation functions are very different. And I go to different people and I would say to Ruth, there are very few commercial mediators that I actually recommend, and "the bigger the matters, the smaller the circle."

It's a different skill set than an arbitrator. An arbitrator needs to be smart, fair, a good listener, write good awards, and make decisions, be firm and be in control. Be managerial of the process without abridging parties' rights, but manage the process.

That's different than mediators. Mediators, something . . . I call it the "special sauce." It's something about your personality, that I can trust you. You can bullshit me a little bit and my clients a little bit. I had one very fine mediator and he came in and badmouthed the other side. He felt good. My client walked out and said, "He's doing the same thing to us." I mean, that's the right personality because you need the mediator to be evaluative not facilitative. I don't need an ambassador, unless the other side and I can't talk. Someone to say, "Okay Cedric, I see your claims, I see problems here and there" and he does this for the other side. It has to be viewed as an honest broker. And maybe not a little sales pitch, but little plug here, but...

So, Thomson Reuters' just came out with a fourth edition of business and commercial litigation in the federal courts. There's a new chapter in there called "Mediation and Mediation Advocacy." Judge Weinstein and myself wrote that. He wrote that to put down his thoughts—and I think he's one of the best mediators—he put down thoughts on how to promote settlement and get people to talk. I'm not aware of this having been done in great detail before.

Jack J. Coe: Can I follow up with all three of you, actually? You really raise really interesting questions to me.

How does advocacy before a mediator, in your role as counsel, differ from your advocacy before an arbitrator or a judge for that matter?

Nathan O'Malley: I think that—and I've been in a fair share of mediations but I'm more of an arbitration person—I would say that often times, as an advocate before a mediator, you need to sometimes gently push back on things that the mediator might be trying to push you towards, which you—through your experience and evaluation—know is a bit of an overreach.

I see mediators come in and say, as an example, “You'll never get this or this won't go this way because of discovery,” or say, “They will get discovery and this will get you there and there.” And I'll say, “Well, you know what? They are not going to get discovery. So start over, because this is not going to be the case.” So, things like that.

Jack J. Coe: Let me just—that suggests to me that a mediator used to litigation has been pressed into an arbitration, for example.

Nathan O'Malley: And that happens quite often, from my experience, because I don't know why, but I usually find it very difficult to find mediators who have a wealth of experience in international arbitration. Most of the times, people I know that do international arbitration don't tend to do mediation and people who are mediators, especially in California, tend not to have that much experience with international arbitration.

Cedric C. Chao: On that topic, having talked with leading litigation partners in foreign law firms from Asia, mediation tends to be more facilitative over there. I think mediation, as a skill set in United States, sort of leads the world in being evaluative. I mean I don't need somebody to be an ambassador, but I need somebody to bang heads. Bang my head and bang my client's head as well as the other party's head.

So, in terms of your question of advocacy in mediation, how does one advocate? I think it's maintaining your credibility, pushing but not pushing so hard. I mean, you have to have a sense in your own mind before you go in: “What's the range of reasonable settlement in this?” And if I, at some point, go too far, I will lose credibility with the other side and with the mediator. But I want to push as far as I can, and push the other side toward the opposite end. So the mediator has to trust you that, when you say, “I can't go that far,” he or she knows, “Okay, I will take Cedric's word for that.” And you can use the mediator to test things. Like, if the mediation fails, I'm back in litigation or back in arbitration, so I don't necessarily want to give up all my deep dark secrets, my weaknesses, or what my real position is going to be. Sometimes the mediator trusts you, and you trust the mediator, and the proposal becomes the mediator's proposal, as opposed to my proposal. And then I can disavow it. He or she can say, “Well that's not Cedric, it's me, what do you think?”

Nathan O'Malley: On that point, I think that advocacy in mediation, more than anything else, is just learning to use the system and not so much really advocate. You are there, using the system, and using the mediator to the greatest effect you can to hopefully get the lines drawn towards the point that your client finds acceptable.

Ruth V. Glick: And from an independent, impartial neutral's point of view, when I mediate—and my experience has been primarily in domestic mediations—I don't know whether what they are telling me is true or not.

Whereas I have greater confidence when I'm sitting as an arbitrator because people are under oath and supposed to be telling the truth. So I might be more confident with the kind of evidence that comes out of arbitration than what I'm told *ex parte* in different rooms in mediation.

When I've done international mediations, the culture plays the bigger role and so I'm very sensitive to that and try to be effective. I can't say I would extend my view of domestic U.S. mediations to those international, but I've had enough experience to know who is telling the truth.

Jack J. Coe: It's very interesting that all three of them teased at something that, as a naïve academic of about twenty years I no longer am, but I was shocked to encounter, this lawyer in London who specialized in mediation advocacy, and he was very open about the fact that the mediator was just another tool in his strategic plan to win the case: that the mediator was a useful conduit for messaging and that the advocacy was geared to that.

Bearing in mind that mediators cannot, by definition, impose an outcome on you, I was a little shocked. But then, there is no rule against *ex parte* contact with the mediator. By the way, I'm not above calling the mediator at her house and saying, "Here's a good idea for settlement. Try this." And of course, coming from arbitration world, I had to think about that.

So to what extent is that true? And she says, "I don't know, in the mediation context, no one's under oath and there's no witness, and the lawyer could theoretically be trying out theoretical possibilities on you."

Ruth V. Glick: Right, and as a mediator, we are used all the time and we are conscious that we are being used.

Answering your question, we ask different advocates: "Why do you think this isn't settling? What do you think the problem is? Do you have any ideas on how to reach this person or solve that problem?" So, it's a totally different role. See, I don't mind that when I'm the mediator I'm not making the decision. But I wanted to point out the differences: as an arbitrator, they can't use me. Remember I said the important difference is I'm in control.

Nathan O'Malley: I want to say one thing. Jack, you probably know this and can confirm this. But I believe in Europe, the "A" references amicable, in which arbitration is generally not included in the ADR rubric. It's only here in the United States, that we include them under the same rooftop. So, I think personally, I prefer the European approach because I think the exact point you raised. They are entirely different. *Ex parte* communications are absolutely fine in the mediation context.

Jack J. Coe: Cedric. Do I follow that because you prefer evaluative mediation, that would, by definition, cause your list of mediators to be very short? Because you want people that not only have this "secret sauce," but also understand the actual substance involved? In other words, an evaluative mediator is one who is going to propose more range of likely outcomes based on what they know. So, it's a little bit like having a "focus group" or a "test jury" or a "test arbitrator."

Cedric C. Chao: I think maybe if I have something 100 million dollars and above, there really may be only ten mediators I would go to. My former firm, current firm, people say . . . they send e-mails. These ten mediators are

the names that come up. People converge on a very small number of top commercial mediators.

What are their characteristics? One is, they are very intelligent. Because you got a big dispute, it's hard to understand. Complicated transactions, you've got to understand it. But there is also the personality: "The magic sauce of personality." It's hard to define, but it's like pornography: I know it when I see it, and it's working or it doesn't work. I've had former federal judges who were excellent judges and excellent arbitrators but when we walked out, nothing happened. He gives you a theoretical analysis but he doesn't have the ability to bring people together and make people come off of their positions. It's really hard to find. But it's the right personality. I think, it really is. I know when I see it: it's working, it's worked before, and he or she is an honest broker. Because if I don't trust the name that he puts forward, I'm not going to choose that person. I'm not going to agree to that.

Jack J. Coe: Nathan, are you more accustomed to evaluative or facilitative mediation? Do you have a preference?

Nathan O'Malley: There are very few cases where I think facilitative mediation is going to be as effective as evaluative mediation. There are some cases where communication, what Cedric alluded to, escaped the parties and where a facilitative mediator has a particular role. But most of the time, I believe that evaluative mediation is most helpful.

There's a point in mediation where you know the good ones from the ones that are not so good. It's about the third hour of the day, to use a biblical reference, where the Rocky music starts to play in the background and you see the mediator's going in and he's got everybody, and he's moving, and he's got the rhythm going in a direction and something's going to happen. There's something about that moment when confidence starts to well up within people in the room and they think, "We are going to get somewhere." It's kind of funny because up until that moment in time, you will not be sure, maybe. But the best approach to mediation I've ever heard is one time where I was with a mediator from the South of the United States and, one of the parties through the mediation process had gotten some steam and said, "You know, this is not getting us justice," and the mediator turned and said, "Son, if you want to get justice, you go buy yourself a dog and name him Justice."

**** Laughter ****

You have to take a little bit of that approach and this is about bringing parties to a solution, and I think that inherently their legal skills come into play but inherently they have to have a practical mind where they can bring parties to where they need to be.

Cedric C. Chao: I have another factor for success in mediators. And by the way, mediators could sometimes be judges. They can be separately appointed for your mediation matters and be somebody else like a federal magistrate or another judge.

They are persistent. The day is over and parties haven't settled. He or she knows where the parties are and parties say they want to come back and have another session. And when you come back, and tempers have gone down, and he or she keeps working at it.

So there's one case I had where there was a lot at stake. We beat each other for four years and we went up to the Ninth Circuit and came back down. We had twelve full days of mediation over two years. It was a huge class action, just a lot of different dynamics. Ultimately, we settled. This mediator had an assistant mediator, who had all the details, because the head mediator was juggling so many different things, and would bring him in. He filed a declaration in federal court in support of the final tentative settlement of the class action. He said, there were many times when this matter almost fell apart. He would keep us together. He would say, "I got some homework for you" just to keep us talking and working. He did this so we are not so focused on how mad we are at each other. There was enough credibility to keep us going.

And that case settled; we could have never settled it without a mediator.

Jack J. Coe: Let me ask what may be the fundamental question. I know that Cedric and I have exchanged e-mails about the frequency of international and commercial disputes of mediation.

My question is: How do the parties get convened? Because I've talked to mediators who say the trick is getting people to convene so you can apply the magic sauce. But it's a voluntary process so when it happens, is it, in your opinion, adjunct to litigation, which is what one expects in a court annexed world, or does it arise because a clause in the contract suggests there should be an attempt at mediation first? Or does it happen because parties have been slugging it out and want something different and its perhaps client driven?

Nathan O'Malley: From my experience, a clause can be helpful, particularly in the way it is drafted. The cultural differences in international arbitration tend to cause mediation to be less used because, generally speaking, clients don't have the familiarity with it. And also, you have to convince them that offering mediation is not an expression of weakness. I think that is something, culturally speaking, is harder outside the United States than it is inside the United States.

Jack J. Coe: Cedric, it is true that we grew up with the culture of ADR and it's part of the fabric. Cedric?

Cedric C. Chao: It comes up in all kinds of different ways. You are right that there are some dispute resolution provisions of contracts, which have a "waterfall" or sequence of events, which is, you can't go to arbitration or court until you first try to work it out informally or go through a mediator.

Another way it came up in another case was in court. We were in a federal appellate court and they had a mandatory conference with a settlement lawyer. And, of course, we were all beating each other up.

No one wanted to show weakness. And then the settlement lawyer asked, "Well, have you guys talked about mediation or anything?" The other person didn't want to show weakness and said, "We wouldn't object to it." That's what he said. I just said something equally palatable.

And then I went back and told my client and asked if he wants to explore. My client said, "It's quite early in the dispute," and said "yes." I called up my opposing counsel and said, "Well, I heard you say that and you and I have been around the racetrack number of times, so you won't interpret

this as weakness. I will come to your office the first time and next time you will come to mine. We will give each other—have three names of mediators we would accept. We will put them face down, put them back up and if there is an intersection, that’s our mediator.” If no intersection, then we go back to our clients and start over again.

We did and there was one name in common and we were off to the races.

Well, that’s one way it happened.